

(5)  
No. 89-228

SUPREME COURT, U.S.

FILED

OCT 30 1989

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1989

VOLKSWAGEN OF AMERICA, INC. and  
BELL PORSCHE-AUDI, INC.,

*Petitioners,*

vs.

GERMAINE GIBBS, AMY GIBBS, LORI  
GIBBS and RAYMOND GIBBS,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

### REPLY MEMORANDUM

MICHAEL HOENIG, ESQ.  
HERZFELD & RUBIN, P.C.  
40 Wall Street  
New York, New York 10005  
212-344-5500  
Of Counsel

October 30, 1989

JOHN T. DOLAN, ESQ.  
*Counsel of Record*

CHRISTINE A. AMALFE, ESQ.  
GUY V. AMORESANO, ESQ.  
CRUMMY, DEL DEO, DOLAN,  
GRIFFINGER & VECCHIONE  
One Gateway Center  
Newark, New Jersey  
07102-5311  
(201) 622-2235  
*Counsel for Petitioners*

9pp



## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE TO THE IMPOSITION OF PUNITIVE DAMAGES AND THE NEED FOR THE USE OF A "CLEAR AND CONVINCING" BURDEN OF PROOF IN THE STATE COURTS BELOW.....	1
II. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE REGARDING BIFUR- CATION AT TRIAL OF THE PUNITIVE ASPECTS OF THE CASE IN THE STATE COURTS BELOW.....	3
III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REMEDY THE CON- STITUTIONALLY INFIRM SYSTEM OF DETER- MINING PUNITIVE DAMAGES LIABILITY .....	5
CONCLUSION.....	6

# TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>CASES</b>	
<i>Feuchtbaum v. Constantine</i> , 59 N.J. 167, 172 (1971).....	4
<b>STATUTES</b>	
N.J. Stat. Ann. 2A:58C-5(b) ( West 1987) .....	4
<b>COURT RULES</b>	
Sup. Ct. R. 22.5 .....	1

## **REPLY MEMORANDUM**

This case presents substantial constitutional issues of national importance. Each day, defendants are faced with the threat of punitive damages awards processed without proper constitutional protections. In New Jersey, as in many other states, the courts have not confronted the serious constitutional ramifications involved in the award of punitive damages. This quasi-criminal aspect of the judicial system has proceeded unchecked and out of control.

Respondents first chose to oppose the Petition for a Writ of Certiorari by silence. Upon direction of this Court to file an Opposition Brief, respondents now choose to proceed to misstate the record. Neither tactic dispels the worthiness of this case for review. The plain fact is that the due process issues involving punitive damages were raised during trial and in the New Jersey appellate courts at all stages when petitioners were bound to do so. Although respondents predictably oppose the instant petition for certiorari, the method, subject matter and content of that opposition is factually indefensible. For these reasons, petitioners respectfully submit this reply memorandum pursuant to Sup. Ct. R. 22.5.

### **I. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE TO THE IMPOSITION OF PUNITIVE DAMAGES AND THE NEED FOR THE USE OF A "CLEAR AND CONVINCING" BURDEN OF PROOF IN THE STATE COURTS BELOW**

Contrary to respondents' empty assertions, petitioners Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. (hereinafter collectively referred to as "VWoA") did properly raise the issue of whether a "clear and convincing evidence" standard of proof is constitutionally necessary for an award of punitive damages in both the trial and appellate courts. For example, in support of petitioners' motion for partial summary judgment dismissing the punitive damages claim in the trial court, petitioners VWoA argued: "This court should adopt a

standard of clear and convincing proof of punitive damages liability in this case.” See Brief in Support of Defendants Volkswagen of America and Bell Porsche-Audi, Inc.’s Motion for Partial Summary Judgment Dismissing Plaintiff’s Punitive Damage Claim at 36-46. Petitioners also argued as part of this pre-trial motion that the “preponderance of the evidence” standard of proof was “unconstitutional as violative of the due process clause under the Fourteenth Amendment to the United States Constitution.” *Id.* at 46. Moreover, petitioners specifically requested that the trial court utilize the more stringent “clear and convincing evidence” burden of proof as part of its charge to the jury. See Petition For a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, App. G at 38a (hereinafter referred to as “Petition for a Writ of Certiorari”). Respondents’ attempt to ignore these plain record facts is frivolous at best.

Similarly, the issue of a “clear and convincing evidence” burden of proof was properly and clearly raised in the Superior Court of New Jersey, Appellate Division. It must be remembered that the trial court had set aside the punitive award. When the Appellate Division reversed the trial court’s judgment notwithstanding the verdict on the issue of punitive damages, VWoA, faced with an Appellate Division ruling imposing, *inter alia*, a punitive damages judgment against it *for the very first time in this case*, promptly called the attention of the appellate court to the major constitutional tensions caused by the imposition of punitive damages under the circumstances which prevailed at trial. In fact, contrary to respondents’ claim in their Brief in Opposition to Writ of Certiorari,<sup>1</sup> VWoA argued before the Appellate Division:

This Court must adopt a clear and convincing standard of proof for punitive damages cases; the use of a lesser

---

<sup>1</sup> Respondents blatantly assert that petitioners “never raised either of the two due process claims they now make in their petition”. Brief in Opposition to Writ of Certiorari to the Superior Court of New Jersey, Appellate Division at 1. The record facts illustrate just the opposite.

standard by the trial court together with vague jury instructions and unlimited jury discretion, deprived defendants of due process of law.

*See* Brief of Defendants-Respondents Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. in Support of Motion for Reconsideration of Opinion of February 9, 1989 at 6. The same constitutional argument was presented to the New Jersey Supreme Court. *See* Petition for Certification to the Appellate Division by Defendants Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. at 7-9. Respondents conveniently and selectively choose not to challenge that uncontroverted fact.

The issue of whether a punitive damages award violates a defendant's due process rights under the Fourteenth Amendment of the United States Constitution where the jury is charged to apply only the minimal "preponderance of the evidence" burden of proof has been clearly and succinctly raised at every stage in the state courts below. That these courts have not addressed and considered the important federal constitutional issues only emphasizes that this Court must intervene in order to protect defendants faced with punitive damages liability imposed by a judicial system which has no mandated procedural safeguards or constitutional guidelines.

## **II. PETITIONERS PROPERLY RAISED THE FEDERAL DUE PROCESS CHALLENGE REGARDING BIFURCATION AT TRIAL OF THE PUNITIVE ASPECTS OF THE CASE IN THE STATE COURTS BELOW.**

In the same misleading way respondents argued that the "clear and convincing evidence" issue was not properly raised in the state courts below, they also contend that VWoA failed to raise the federal due process challenge to the trial court's failure to bifurcate the proceedings.<sup>2</sup> Once again, respondents totally ignore the record below.

---

<sup>2</sup> Respondents also argue: "It is a disgrace that petitioners would attempt to mislead the United States Supreme Court on the question of when the new statute guiding product liability trials went into effect". Brief in Opposition to Writ of Certiorari to the Superior Court

VWoA specifically requested that the trial court bifurcate the liability aspects of the trial from the punitive damages claim. *See* Petition for a Writ of Certiorari, App. D at 20a-21a. This argument was then explicitly presented again to the New Jersey Superior Court, Appellate Division, in the Brief of Defendants-Respondents Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. in Support of Motion for Reconsideration of Opinion of February 8, 1989 at 4. The bifurcation issue was similarly raised in the Supreme Court of New Jersey. *See* Petition for Certification to the Appellate Division by Defendants Volkswagen of America, Inc. and Bell Porsche-Audi, Inc. at 9-11. Respondents' deliberate tactic of ignoring these submissions to the New Jersey state courts, by trying to improperly focus this Court's attention solely on the opinion of the New Jersey Appellate Division violates every covenant of good faith and fair dealing. That opinion first reinstated a punitive award that the trial court had set aside.

Petitioners VWoA thus properly preserved the bifurcation issue below by raising it at each level of the state court system. It is respectfully submitted that this Court should now finally review the compelling constitutional issues that the state courts refuse to address.

---

of New Jersey, Appellate Division at 4. It is respectfully submitted that the attempt to mislead is made, not by petitioners, but by respondents Gibbs. N.J. Stat. Ann. 2A:58C-5(b) (West 1987), which provides for bifurcation of punitive damages proceedings in New Jersey was to "take effect immediately", except where it imposes new rules respecting burdens of proof or the imposition of liability. *Id.* The dictate of the purely procedural portion of the statute regarding bifurcation thus applied to the trial of this case, which began seven months *after* the statute became effective. In addition, the New Jersey Supreme Court has held that procedural statutes and rules of court are to be given retrospective application. *Feuchtbaum v. Constantine*, 59 N.J. 167, 172 (1971). Petitioners were thus improperly and unconstitutionally deprived of the legislatively mandated procedural protection of bifurcation. The apparent willingness of the state courts to overlook this cardinal safeguard, even when provided by statute, enhances the worthiness of this case for review by this Court from the perspective of due process.



### **III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO REMEDY THE CONSTITUTIONALLY INFIRM SYSTEM OF DETERMINING PUNITIVE DAMAGES LIABILITY.**

This case presents not only constitutional issues of great moment and significance, but also two reasonably precise mechanisms by which due process may be effectively safeguarded. Petitioners were deprived of due process of law under the United States Constitution as a result of the New Jersey state courts' refusal to utilize a "clear and convincing evidence" burden of proof, and because petitioners were arbitrarily deprived of the additional procedural protection of bifurcation at trial.

Contrary to respondents' contentions, the decision whether to afford defendants in punitive damages cases the valuable procedural safeguards of trial bifurcation, and the use of the more stringent "clear and convincing" burden of proof cannot and should not be left to the unguided discretion of individual state legislatures or courts. The result in this case amply illustrates what happens when mandates of due process are ignored. Application of an alarmingly arbitrary quasi-criminal system of justice on a daily basis in a non-uniform, standardless manner across the nation warrants review by this Court to mandate appropriate constitutional protections. This case presents two explicit means by which defendants in punitive damages cases will be spared quasi-criminal penalties imposed by unguided jurors operating within a system which fails to focus the jury's attention upon the gravity of their task. It is respectfully submitted that this case is both a proper vehicle and properly positioned for a declaration that punitive damages must be awarded only under the strictest of constitutionally firm procedural guidelines.

## CONCLUSION

For the reasons set forth herein, and in VWoA's Petition for a Writ of Certiorari, it is respectfully submitted that the time has come for this Court to resolve these substantial issues. It is respectfully requested that a Writ of Certiorari be granted.

Respectfully submitted,

JOHN T. DOLAN, ESQ.,  
*Counsel of Record*

CHRISTINE A. AMALFE, ESQ.  
GUY V. AMORESANO, ESQ.  
CRUMMY, DEL DEO, DOLAN,  
GRIFFINGER & VECCHIONE  
A Professional Corporation  
One Gateway Center  
Newark, New Jersey 07102-5311  
(201) 622-2235  
Attorneys for Petitioners

### OF COUNSEL:

MICHAEL HOENIG, ESQ.  
HERZFELD & RUBIN, P.C.  
40 Wall Street  
New York, New York 10005  
(212) 344-5500

DATED: OCTOBER 30, 1989

